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WAH SHEN DEVELOPMENT SDN BHD v. SUCCESS PORTFOLIO SDN BHD

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
BADARIAH SAHAMID JCA
B KAMARDIN HASHIM JCA
[CIVIL APPEAL NO: Q-02(NCVC)(W)-10-01-2016]
12 MARCH 2018

C ***TORT:*** *Nuisance – Private nuisance – Action by property developer against owner of pig farm – Parties owners of neighbouring lands – Allegation that smell from pig farm affected sale of properties developed by property developer – Whether smell from pig farm minimal – Whether pig-rearing business licensed – Whether pig farm had been operating before property developer bought adjoining land – Whether property developer aware of pig farm business – Whether property developer brought nuisance*
D *on itself*

TORT: *Nuisance – Injunction – Application for perpetual injunction by property developer against owner of pig farm – Parties owners of neighbouring lands – Allegation that smell from pig farm affected sale of properties developed by property developer – Whether smell from pig farm minimal – Whether farm ought to be*
E *restrained from continuing with rearing of pigs*

TORT: *Damages – Claim for – Action by property developer against owner of pig farm – Parties owners of neighbouring lands – Allegation that smell from pig farm affected sale of properties developed by property developer – Property developer*
F *allegedly suffered losses and claimed for general and specific damages – Whether property developer proved claim for damages*

The appellant ('plaintiff'), a property developer, instituted an action at the High Court, based on the tort of private nuisance, against the respondent ('defendant'), who ran a pig-rearing business. The parties were owners of the
G lands situated next to each other. According to the plaintiff, the smell from the defendant's pig farm had adversely affected the plaintiff's sale of its properties, causing the plaintiff to incur a loss of RM10,989,111.80. The plaintiff prayed for a perpetual injunction to restrain the defendant from continuing with the rearing of pigs on its land and general and special damages. In defence, the defendant argued that (i) the smell from the
H defendant's pig farm was minimal and not unreasonable; (ii) the pig-rearing business was licensed by the relevant governmental authorities, including the Department of Agriculture; (iii) the defendant had been operating the pig farm well before the plaintiff bought the adjoining land and the plaintiff was aware of the pig farm business; and (iv) the adjoining land by the plaintiff was
I originally categorised as agricultural land before the category of land use was converted to its present usage. The High Court Judge ('HCJ') visited the plaintiff's land and unreservedly found that the defendant's pig farm

emanated a strong stench. However, the HCJ dismissed the plaintiff's claim on the grounds that (i) the defendant's pig farm was a licensed operation and the license was subject to certain conditions; (ii) even though the defendant breached condition 8 of the licence, which provided that suitable trees or plants should be placed around the farm to control malodour and to act as a buffer zone and hoarding should be erected at the farm boundary, this breach was a matter for the relevant authority to consider before the yearly renewal of the license; and (iii) the plaintiff brought the nuisance upon itself as the defendant's pig farm existed before the plaintiff altered the category of land use for mixed development. Hence, the present appeal.

Held (allowing appeal in part)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) The tort of private nuisance is an interference with the use and enjoyment of land. The act which constitutes nuisance may include sounds, smells and vibrations which unduly interfered with the plaintiff's enjoyment of his land. Having correctly referred to the law of tort and relevant authorities that smells could constitute a nuisance in law and, following that, after making an unreserved finding that the defendant's pig farm emanated a strong stench that reached the plaintiff's land, in particular its properties, the HCJ erred in her failure to make a finding that the defendant committed the tort of private nuisance to the plaintiff. (paras 17 & 20)

(2) The HCJ misdirected herself in her conclusion that although the defendant breached condition 8 of the licence, it was not a material factor for consideration but a matter for the relevant licensing authorities to consider. On the contrary, the omission of the defendant was a pertinent factor in the cause of commission of the tort of private nuisance. (para 21)

(3) The HCJ erred in law in finding that the plaintiff, by altering the land use to mixed development when it was aware of the existence of the defendant's pig farm in the adjoining land, had 'brought the nuisance upon themselves'. From the HCJ's own findings, it was the defendant who had committed the tort of nuisance. There were no legal authorities that a party could bring a nuisance upon themselves. (para 22)

(4) The HCJ erred in law in her application of 'the eggshell skull rule' to the facts of this case. According to the HCJ, the defendant's pig farm preceded the plaintiff's purchase and development of his properties, therefore the plaintiff was compelled to accept the nuisance created by the defendant as the plaintiff had to take the defendant as he found him. In this context the defendant's pig-rearing activity with the resultant stench constituted the 'eggshell skull principle'. This was an incorrect statement of the 'eggshell skull principle'. The authorities refer to the

'egg shell skull principle' as vulnerabilities or weaknesses of specific plaintiffs in negligence cases. According to this principle, a defendant could not plead the peculiar vulnerabilities or sensitivities of a plaintiff to avoid liability to a plaintiff. During cross-examination, the defendant agreed that the plaintiff was not particularly sensitive to odour emanating from the defendant's pig farm. Therefore, the HCJ clearly misdirected herself in this respect. (paras 23-25)

(5) The HCJ had given undue consideration to the fact that the defendant's pig farm pre-existed the plaintiff's mixed development, which Her Ladyship had construed as giving the defendant certain rights, including the right to commit private nuisance. The HCJ erred in her failure to give due consideration to the current usage of the land by the plaintiff in determining whether the defendant created the private nuisance to the plaintiff. The duration of a particular activity is not a material consideration. What is material is the changes within a locality that may render the existing activities a nuisance to its current neighbours. (paras 25 & 27)

(6) The plaintiff had not proven specific and general damages. The appeal was allowed only in respect of the injunction as prayed for by the plaintiff, namely 'the perpetual injunction to restrain the defendant from continuing with the rearing of pigs in their land with an open pond to collect the faeces of the pigs'. (paras 29 & 30)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif'), pemaju hartanah, memulakan satu tindakan di Mahkamah Tinggi, berasaskan tort kacau ganggu persendirian, terhadap responden ('defendan'), yang menjalankan perniagaan ternakan khinzir. Pihak-pihak adalah pemilik tanah bersebelahan satu sama lain. Menurut plaintif, jualan hartanah-hartanahnya terjejas teruk akibat bau ladang khinzir defendan, menyebabkan plaintif mengalami kerugian sebanyak RM10,989,111.80. Plaintif memohon injunksi kekal untuk menghalang defendan meneruskan ternakan khinzir di ladangnya dan ganti rugi am dan khas. Dalam pembelaannya, defendan menghujahkan (i) bau ladang khinzir defendan amat sedikit dan bukan tidak munasabah; (ii) perniagaan ternakan khinzir memperoleh lesen daripada Pihak Berkuasa Kerajaan relevan, termasuk Jabatan Pertanian; (iii) defendan sudah lama mengendalikan ladang khinzir tersebut sebelum plaintif membeli tanah bersebelahan dan plaintif sedia maklum akan perniagaan ladang khinzir defendan; dan (iv) tanah bersebelahan plaintif asalnya dikategorikan sebagai pertanian sebelum kategori penggunaan tanah ini ditukar menjadi penggunaan semasa. Hakim Mahkamah Tinggi ('HMT') melawat tanah plaintif dan sepenuhnya berpendapat ladang khinzir defendan mengeluarkan bau yang amat busuk. Walau bagaimanapun, HMT menolak tuntutan plaintif atas alasan (i) ladang

khinzir defendan ialah operasi berlesen dan lesen ini tertakluk pada beberapa syarat; (ii) walaupun defendan melanggar syarat 8 lesen, yang memperuntukkan pokok-pokok atau tanaman sesuai harus ditanam keliling ladang demi mengawal bau busuk dan bertindak sebagai zon penimbal dan dinding adang harus didirikan di sempadan ladang, hal perkara ini adalah untuk pertimbangan pihak berkuasa relevan sebelum pembaharuan lesen tahunan; dan (iii) plaintif sendiri yang mengundang kacau ganggu yang menimpanya kerana ladang khinzir defendan wujud sebelum plaintif mengubah kategori penggunaan tanah menjadi pembangunan pelbagai. Maka timbul rayuan ini.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Tort kacau ganggu persendirian ialah gangguan penggunaan dan kenikmatan tanah. Tindakan yang membentuk kacau ganggu termasuk bunyi-bunyian, bau-bauan dan getaran terlampau yang mengganggu kenikmatan plaintif akan tanahnya. Setelah, dengan betul, merujuk pada undang-undang tort dan nas-nas relevan bahawa bau-bauan boleh membentuk kacau ganggu dalam undang-undang dan, berikutan itu, sepenuhnya berpendapat ladang khinzir defendan mengeluarkan bau yang amat busuk yang melewati tanah plaintif, khususnya hartanah-hartanah plaintif, HMT terkhilaf dalam kegagalan beliau membuat dapatan bahawa defendan melakukan tort kacau ganggu persendirian terhadap plaintif.

(2) Hakim Mahkamah Tinggi tersalah arah diri beliau dalam menyimpulkan, walaupun defendan melanggar syarat 8 lesen, ini bukan faktor material untuk pertimbangan tetapi hal perkara untuk dipertimbangkan oleh pihak berkuasa pelesen relevan. Sebaliknya, ketinggalan defendan adalah satu faktor yang bersangkut-paut dengan kausa pelakuan tort kacau ganggu persendirian.

(3) Hakim Mahkamah Tinggi terkhilaf, bawah undang-undang, dalam mendapati plaintif, dengan mengubah penggunaan tanah menjadi pembangunan pelbagai sedangkan plaintif sedar kewujudan ladang khinzir defendan di tanah bersebelahan, telah mengundang sendiri kacau ganggu yang menimpanya. Berdasarkan dapatan-dapatan HMT sendiri, defendan yang melakukan tort kacau ganggu. Tiada nas undang-undang yang mengatakan satu-satu pihak boleh mengundang sendiri kacau ganggu.

(4) Hakim Mahkamah Tinggi terkhilaf bawah undang-undang dalam pemakaian 'egg shell skull rule' pada fakta dalam kes ini. Menurut HMT, ladang khinzir defendan sudah wujud sebelum plaintif membeli dan membangunkan hartanah-hartanahnya; oleh itu, plaintif terpaksa menerima kacau ganggu oleh defendan kerana plaintif hendaklah

menerima defendan seadanya. Dalam konteks ini, aktiviti ternakan khinzir defendan dengan bau busuk yang terhasil membentuk prinsip 'egg shell skull'. Ini adalah pernyataan prinsip 'egg shell skull' yang salah. Nas-nas merujuk prinsip 'egg shell skull' sebagai kelemahan-kelemahan plaintif-plaintif khusus dalam kes-kes kecuaian. Menurut prinsip ini, seorang defendan tidak boleh memplidkan kelemahan-kelemahan atau kesensitivitian khusus seorang plaintif untuk menolak liabiliti terhadap plaintif tersebut. Dalam pemeriksaan balas, defendan bersetuju plaintif tidak, secara khusus, sensitif pada bau busuk ladang khinzir defendan. Oleh itu, HMT jelas tersalah arah diri beliau dalam hal ini.

(5) Hakim Mahkamah Tinggi memberi pertimbangan tidak wajar pada fakta bahawa ladang khinzir defendan wujud dahulu sebelum pembangunan pelbagai plaintif, yang beliau tafsirkan sebagai memberi defendan hak-hak tertentu, termasuk hak melakukan kacau ganggu persendirian. Hakim Mahkamah Tinggi terkhilaf dalam kegagalan beliau memberi pertimbangan pada penggunaan semasa tanah oleh plaintif dalam mengenal pasti sama ada defendan melakukan kacau ganggu persendirian terhadap plaintif. Tempoh satu-satu aktiviti khusus bukan pertimbangan material. Yang material ialah perubahan penduduk setempat yang boleh menjadikan aktiviti-aktiviti sedia ada satu kacau ganggu terhadap jiran-jiran semasa.

(6) Plaintif tidak membuktikan ganti rugi am dan khas. Mahkamah membenarkan rayuan hanya berkenaan injunksi yang dipohon oleh plaintif iaitu 'injunksi kekal untuk menghalang defendan berterusan menternak khinzir di ladangnya dengan kolam terbuka untuk mengumpul najis khinzir'.

Case(s) referred to:

Chin Lih Lih & Ors v. Sunrise Alliance Sdn Bhd & Anor [2011] 1 LNS 1069 HC ***(refd)***

Dr Christian Jurgen Kaul & Anor v. Meru Valley Resort Bhd [2013] 6 CLJ 597 HC ***(refd)***

Gillingham Borough Council v. Medway (Chatham) Dock Co. Ltd [1992] 3 All ER 923 ***(refd)***

Ong Koh Hou v. Perbadanan Pembangunan Bandar & Anor [2009] 1 LNS 512 HC ***(refd)***

Sturges v. Bridgman [1879] 11 Ch D 852 ***(refd)***

Woon Tan Kan & Ors v. Asian Rare Earth Sdn Bhd [1992] 4 CLJ 2299; [1992] 3 CLJ (Rep) 786 HC ***(refd)***

Other source(s) referred to:

Clark & Lindsell on Torts, 18th edn, London, Sweet & Maxwell, 2000, p 979

For the appellant - Lim Heng Choo; M/s Lim & Lim Advocs
For the respondent - Jonathan Chong; M/s TC Chong & Co Advocs

[Editor's note: For the High Court judgment, please see Wah Shen Development Sdn Bhd v. Success Portfolio Sdn Bhd [2016] 3 CLJ 164 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Badariah Sahamid JCA:

Introduction

[1] This is an appeal against the decision of the learned High Court Judge at Kuching delivered on 7 December 2015, dismissing the plaintiff's claim against the defendant for injunctive relief and damages on account of private nuisance.

[2] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

Background Facts

[3] A summary of the background facts is derived from the learned trial judge's grounds of judgment with suitable modifications.

[4] The plaintiff and defendant are neighbours, being owners of parcels of land situated next to each other. The plaintiff's two parcels of land are described as Lot 274 and Lot 407 and that of the defendant, Lot 1991. In addition, the plaintiff has been granted a power of attorney over three parcels of land described as 'Leases of Crown Land' No. 11148, 11149 and 11150. These three parcels of land adjoin Lot 274 and Lot 407. For the sake of simplicity, all five parcels of land will be referred to as the plaintiff's land. All the aforesaid land is situated in the Sentah-Segu Land District along the Kuching-Samarahan Expressway.

[5] The plaintiff is a property developer whilst the defendant is in the business of pig-rearing.

[6] The plaintiff had developed its five parcels of land into a mixed development comprising residential houses as well as shophouses. The mixed development had been completed.

[7] Whilst the mixed development was in the process and at all material times, the defendant's pig-rearing business was in operation.

[8] It was also an undisputed fact that the State Government in an announcement reported in the Borneo Post on 25 March 2015, had disclosed the State initiative to locate or re-locate all pig farms in the Kuching and Samarahan areas to a designated area called Pasir Puteh Pig Farming Area which is near another rural town in Sarawak's First Division ie, Simunjan.

[9] The plaintiff had instituted an action in private nuisance against the defendant, alleging that the smell from the defendant's pig farm had adversely affected the plaintiff's sale of its residential houses as well as shophouses on the plaintiff's land, causing the plaintiff to incur a loss of RM10,989,111.80.

[10] The plaintiff has therefore prayed for a perpetual injunction to restrain the defendant from continuing with the rearing of pigs on their land, special damages in the sum specified above as well as general damages and costs.

[11] The defendant's defence was that the smell from the defendant's pig farm was minimal and not unreasonable. The defendant also claimed their pig-rearing business was licensed by the relevant governmental authorities including the Department of Agriculture. In addition, the defendant claimed they had been operating the pig farm well before the plaintiff bought the adjoining land, and the plaintiff was aware of the pig farm business. In addition, the adjoining land bought by the plaintiff was originally categorised as agricultural land before the category of land use was converted to the present usage.

[12] Prior to delivering her decision, on the application of the plaintiff, the learned trial judge had visited the plaintiff's land which was adjoining the defendant's pig farm.

Issue

[13] The issue before the trial judge was whether the plaintiff was entitled to a perpetual injunction to restrain the defendant from continuing with the rearing of pigs on the defendant's land and whether damages are recoverable?

Findings And Decision Of The High Court

[14] The learned trial judge had dismissed the plaintiff's claim for an injunction and damages. The findings and decision of the learned trial judge are summarised as follows.

(i) The defendant's pig farm was a licensed operation. The licence was subject to certain conditions. Conditions 8 and 10 are pertinent to the instant matter.

> 8. Suitable trees or plants should be placed around the farm to control malodour and to act as buffer zone. Hoarding should be erected at the farm boundary.
>
> 9. The licence is revocable under section 44-6(b) of the Veterinary Public Health Ordinance, 1999, should the owner breach the conditions or caused pollution to any watercourse.
>
> 10. This farm is to be moved to the Pig Farming Area (PFA) once it is established.

(ii) The defendant had breached condition 8 of the licence. However, this matter is for the relevant authority to consider before the yearly renewal of the licence. At p. 169 of her judgment, the learned trial judge had stated as follows:

> Mr. Granda (PW1) in Q & A 12 of his witness statement (marked WSPW1) said that condition 8 has been breached in that there were no trees and plants planted to act as a buffer zone, the absence of which I have noted when during the site visit. To be fair to the defendant, there were indeed trees planted on the farm but ones which were meant to act as a buffer zone were not there but absence of which cannot be strictly held against them because prior to the plaintiff's development, as stated earlier, the chicken farm was on the plaintiff's land.

(iii) The plaintiff had brought the nuisance upon themselves as the defendant's pig farm had existed before the plaintiff had altered the category of land use for mixed development. At p. 171 of her judgment, the learned trial judge had stated as follows:

> It is clear from the undisputed fact of the prior existence of the pig farm on the defendant's land before the development of the plaintiff's land and the original title conditions of the plaintiff's land ie, agricultural that the plaintiff brought the nuisance upon themselves. There is a principle in tort commonly known as the egg shell skull principle which simply said means that a defendant must take the plaintiff as he is. It works the reverse here-the plaintiff have to take the defendant as it is because it was there first-legitimately operating the in pig farm before the plaintiff decided to come in, bought what is agricultural land and vary the title condition to build the houses and the shophouses without any concrete assurance whatsoever that the pig farm next door would be relocated.

Grounds Of Appeal

[15] The plaintiff's grounds of appeal may be summarised as follows:

(i) The learned judge had erred in her failure to consider the current status of the land use by the plaintiff *viz a viz* the land use by the defendant as a pig farm to determine whether private nuisance was caused by the defendant.

(ii) The learned judge had erred in her failure to appreciate that the defendant, being earlier in time, in using their land as a pig farm did not give the defendant any rights to create private nuisance to the plaintiff's land where the land use had been changed from agricultural to mixed development involving shophouses and townhouses. The case of *Sturges v. Bridgman* [1879] 11 Ch D 852 applies.

(iii) The requisite approval by the relevant authorities to vary the plaintiff's land to mixed development show that the location of the defendant's pig farm was no longer suitable. The State Government had also developed Pig Farming Area (PFA) at Simunjan.

(iv) The learned judge had erred in her finding that the smell from the defendant's pig farm was strong, yet failed to find that the defendant had created a private nuisance to the plaintiff.

(v) The learned judge had erred in her failure to appreciate that a breach of the condition 8 of the defendant's licence meant that the defendant had failed to plant trees and erect hoarding to prevent the smell of the pig farm from reaching the plaintiff's adjoining land and had caused the private nuisance to the plaintiff.

(vi) The learned judge had erred in her finding that the plaintiff had brought the nuisance upon themselves. The learned judge had misdirected herself on the application of the "*eggshell-skull* principle" which applies to negligence cases where the defendant must take the plaintiff as he finds him.

(vii) The learned judge had failed to appreciate that the private nuisance created by the defendant entitled the plaintiff to injunctive relief as well as damages for the losses suffered by the plaintiff.

Our Decision

[16] After careful consideration of learned counsel's oral and written submissions as well as a perusal of the appeal records, we were of the unanimous view that there were merits in this appeal. We, therefore, allowed this appeal in part in that we allowed only the injunctive relief prayed for by the plaintiff, but made no order in respect of specific or general damages. The reasons for our decision are stated below.

[17] The tort of private nuisance is an interference with the use and enjoyment of land. The acts which constitute nuisance may include sounds, smells and vibrations which unduly interferes with the plaintiff's enjoyment of his land. In *Clark & Lindsell on Torts* (18th edn.) London, Sweet & Maxwell, 2000, at p. 979, the pertinent considerations which amount to private nuisance is stated thus:

> It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The acts complained as constituting the nuisance, such as voice, smells or vibration, will usually be lawful acts which only become wrongful from the circumstances under which they are performed, such as time, place, extent or the manner of performance. In organised society everyone must put up with a certain amount of discomfort and annoyance caused by the neighbours … No precise or universal formula is possible, but a useful test is what is reasonable according to ordinary usages of mankind living in a particular society.

(See also the cases of *Dr. Christian Jurgen Kaul & Anor v. Meru Valley Resort Bhd.* [2013] 6 CLJ 597; [2014] 9 MLJ 539; *Ong Koh Hou v. Perbadanan Pembangunan Bandar & Anor* [2009] 1 LNS 512; [2009] 8 MLJ 616; *Chin Lih Lih & Ors v. Sunrise Alliance Sdn Bhd & Anor* [2011] 1 LNS 1069; [2011] 11 MLRH 32).

[18] In the case of *Woon Tan Kan & Ors v. Asian Rare Earth Sdn Bhd* [1992] 4 CLJ 2299; [1992] 3 CLJ (Rep) 786 HC, the plaintiff sued the defendants, principally for an injunction to restrain the defendant company (ARE) from operating and continuing to operate its factory on the grounds that the activities of the factory produced dangerous radioactive gases harmful to the residents of Bukit Merah. The High Court granted a *qua timet* injunction and held that the tort of private nuisance was established.

[19] The learned judge who had visited the plaintiff's land which adjoins the defendant's pig farm had unreservedly found that the defendant's pig farm emanated a strong stench. In addition, from all the evidence in court, documentary and oral, there was evidence that private nuisance had been created by the defendant to the plaintiff.

In her judgment (at p. 167) the learned judge states as follows:

> Sharing the immediate border with the pig farm are two rows of shop houses and behind them are the residential units … The pig farm ends at about where the first row of the residential units begins … I noted there is also a large pond on the pig farm which according to Dr. Ng Siew Thiam is the oxidation pond where all the wastes from the pig farm are channelled to.
>
> When we arrived at the site it was about 3.00 p.m. The air was not pristine and though no noticeable wind was felt, the smell especially at the vicinity of the shophouses was strong. That would be unavoidable, of course and the source of that stench could not be from any other place but the pig farm.

[20] Having correctly referred to the law of torts and relevant authorities that smells can constitute a nuisance in law, and following that, after making an unreserved finding that the defendant's pig farm emanated a strong stench that reached the plaintiff's land, in particular, the shophouses and residential units, the learned judge had erred in her failure to make a finding that the defendant had committed the tort of private nuisance to the plaintiff.

[21] We are also of the view that the learned judge had misdirected herself in her conclusion that although the defendant had breached condition 8 of his licence in his failure to plant trees that would act as a buffer to prevent the smells from reaching the plaintiff, it was not a material factor for consideration by the court but a matter for the relevant licensing authorities to consider in the process of yearly renewal of the licence. On the contrary, we find the omission of the defendant, a pertinent factor in the cause of the commission of the tort of private nuisance.

[22] We are also in agreement with the submissions of the plaintiff/appellant that the learned judge had erred in law when she made a finding that the plaintiff, by altering the land use to mixed development when he was aware of the existence of the defendant's pig farm in the adjoining land had "brought the nuisance upon themselves". From the learned judge's own findings, it was the defendant who had committed the tort of nuisance. We are not aware of any legal authorities that a party can bring a nuisance upon themselves.

[23] We also agree with the plaintiff/appellant that the learned judge had erred in law in her application of "the egg shell skull rule" to the facts of this case. According to the learned judge, the defendant's pig farm preceded the plaintiff's purchase and development of his property, therefore the plaintiff is compelled to accept the nuisance created by the defendant as the plaintiff has to take the defendant as he finds him. In this context, the defendant's pig rearing activity with the resultant stench constitutes the "eggshell-skull principle". This is an incorrect statement of the "eggshell-skull principle".

[24] The authorities refer to the "eggshell-skull principle" as vulnerabilities or weaknesses of specific plaintiffs in negligence cases. According to this principle, a defendant cannot plead the peculiar vulnerabilities or sensitivities of a plaintiff to avoid liability to a plaintiff. In this respect, the defendant through DW1 had agreed in cross-examination that the plaintiff is not particularly sensitive to the odour emanating from the defendant's pig farm. (At p. 115 Part B record of appeal).

> Q. Do you agree that the plaintiff's claim for private nuisance created by your pig farm is not due to the fact that the plaintiff is peculiarly sensitive to your pig farm's bad odour or smell?
>
> A. I agree

Thus, the learned judge had clearly misdirected herself in this respect.

[25] In addition to the above, the learned judge had given undue consideration to the fact that the defendant's pig farm had pre-existed the plaintiff's mixed development which she had construed as giving him certain rights, including apparently, the right to commit private nuisance. It was not disputed that the category of land use of the plaintiff's land had been altered to mixed development by the relevant authorities. Thus the learned judge had erred in her failure to give due consideration to the current usage of land by the plaintiff in determining whether the defendant had created the private nuisance to the plaintiff.

[26] In the case of *Gillingham Borough Council v. Medway (Chatham) Dock Co. Ltd* [1992] 3 All ER 923, planning permission had been granted to change the use of an old naval dockyard into a commercial port (which turned out to be very noisy at night). Buckley J held that , "where planning permission

is given … the question of nuisance will thereafter fall to be decided by reference to a neighbourhood with … (the new) development or use and not as it was previously."

[27] It would appear too that the duration of a particular activity is not a material consideration. What is material is the changes within a locality that may render the existing activities a nuisance to its current neighbours. In the case of *Sturges v. Bridgman* (1879) 11 Ch D 852, the defendant, a confectioner had for more than 20 years used large mortars in his back kitchen, which abutted on the garden of a physician. Subsequently, the physician erected in his garden a consulting room, one of the side walls of which was the wall between the confectioner's kitchen and the garden. The noise and vibration caused by the use of mortars, which had previously caused no material annoyance to the physician, then became a nuisance to him. It was held that the defendant had committed a nuisance and thus the plaintiff was entitled to an injunction.

[28] For all the above reasons stated, we are of the view that the learned judge had made perverse findings and misdirected herself in law to warrant our appellate intervention.

[29] We however, do not find that the plaintiff had proven specific and general damages.

[30] In conclusion, we order the injunctive relief prayed for by the plaintiff in the following terms:

> We allowed the appeal in part, that is to say we allowed the appeal only in respect of the injunction as prayed for in the plaintiff's statement of claim, para. 19(a), "the perpetual injunction to restrain the defendant from continuing with the rearing of pigs in their land with an open pond to collect the faeces of the pigs forthwith". The injunction to be effective six months from the date of this order. Decision of the learned High Court Judge is set aside. Costs of RM10,000 subject to allocator. Deposit to be refunded to the appellant.